IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-154

WILSON H. ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND,
Petitioner,

v.

JUAN CARLOS MORENO, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE COMMONWEALTH OF VIRGINIA, THE STATES OF NORTH CAROLINA, SOUTH CAROLINA, AND WEST VIRGINIA, AND THE AMERICAN COUNCIL ON EDUCATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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INTERESTS OF AMICI

The interests of amici and their reasons for petitioning this Court to grant certiorari are as follows:

Amici are states and the nation's largest association of colleges and universities. All are vitally concerned with preserving a rational system of tuition rate assignments for students in publicly-supported colleges

and universities in order to ensure the fiscal integrity of these institutions.

Amici are deeply concerned about the ongoing financial crisis in publicly-supported colleges and universities. To assure that effective post-secondary educational programs are provided to the increasing number of potential students who seek enrollment, the amici urge that the Court uphold the rational system of classification imposed by the University of Maryland. The consequences of striking down the classification may ultimately force publicly-supported colleges and universities to charge the same rate of tuition to all students, regardless of state residency or domicile. This would deprive state taxpayers of the direct benefit of their support by raising the cost of education for them and their dependent children. It might require increasing the state tax burden because revenues provided by a uniform tuition rate at present levels would fail to meet a reasonable proportion of an institution's operating costs. In addition, if tuition rates are made uniform at a higher level, needy state residents might be precluded from any higher education because of the higher cost.

Amici seek to preserve an open enrollment policy among state-supported colleges and universities, in order to promote a heterogeneous student body. Judicial elimination of a reasonable system of tuition differentials may eliminate this diversity by provoking "the natural response of States which, having placed high value on universities, having developed great institutions at large cost, believe that other States should do the same and therefore seek ways to keep the institution in being for its own citizens." *Vlandis v. Kline,* 412 U.S. 441, 463 (1973) (Burger, C.J. dissenting).

Amici also seek continuation of this court' recognition of the legitimacy of "[t]he State's objective of cost

equalization between bona fide residents and nonresidents." *Vlandis, supra* at 448. This Court should now facilitate that objective by affirming the right of publicly-supported higher education institutions to classify students in a manner reasonably calculated to achieve that goal.

Amici hope to assure publicly-supported schools the receipt of reasonable tuition revenues. Affirmance of the decision below would enable non-immigrant aliens to reduce their tuition payments by the existing cost differential. Schools with large numbers of such students will feel the cost impact immediately.

Amici maintain that proper application of constitutional principles and the practical consequences of the irrebuttable presumption doctrine warrant overruling *Vlandis v. Kline, supra*, which has been used as a mechanism for overturning countless state legislative judgments. Amici accordingly urge that this Court grant Appellants' petition for certiorari to consider the decision of the lower court.

QUESTIONS PRESENTED

1. Whether strict judicial scrutiny, in the guise of an irrebuttable presumption analysis which is internally inconsistent and financially deleterious to public colleges and universities, must be applied to a rationally based in-state and out-of-state tuition policy such as that of the University of Maryland and of the great majority of public institutions of higher education in the United States?

2. Whether decisions of this Court have so eroded the irrebuttable presumption doctrine embodied in *Vlandis v. Kline,* 412 U.S. 441 (1973), that this Court should now declare that doctrine overruled?

ARGUMENT

THE IRREBUTTABLE PRESUMPTION DOCTRINE OF *VLANDIS v. KLINE SHOULD BE OVERRULED.*

This case raises issues of great importance to states and particularly to their public colleges and universities. The difference between the tuition paid by resident students and those enrolling from out of state represents a vital source of income to these institutions. Nearly five years ago that income was estimated at between $250 and $300 million a year for just 400 public four-year colleges and universities belonging to the National Association of State Universities and Land Grant Colleges and the American Association of State Colleges and Universities. W. Waugh, *Is Out-of-State Tuition Legal?*, 4 Change 22 (Winter 1972-73). Time and inflation have heightened dependency on that income. This Court in *Vlandis v. Kline*, 412 U.S. 441 (1973), while conceding the rationality of the governmental objectives proffered in support of Connecticut's in-state/out-of-state tuition system, held that due process mandated an individualized determination of a student's status to overcome what it contended was an impermissible "permanent irrebuttable presumption of nonresidence." In so doing, a majority of this Court pointed to domicile as a reasonable standard for determining the residential status of a student.

After *Vlandis*, public colleges and universities predicated their tuition policies on student domicile and established elaborate and expensive appeal mechanisms to afford students the individualized determinations they believed to be mandated by this Court. Viewed in the short run, the *Vlandis* decision may have aided a few students deserving of preferential tuition; however, viewed more realistically, the 1973 ruling opened the door to many students who lack even

minimal affinity to the states which bear the financial brunt of their education.

In the present case, the lower courts take *Vlandis* one step further by striking down a rational tuition system based on domicile. The decisions below question a public university's ability to adopt a reasonable determination of domicile consistent with state law, common sense, and decisions of this Court. *See Matthews v. Diaz*, 426 U.S. 67 (1976).

As devastating to educational interests as the result reached by the lower courts in the instant case is the manner in which that result was reached. The irrebuttable presumption doctrine has been denounced by legal scholars since the days of Mr. Justice Holmes. *See Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926). *See also* Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 Ind. L. Rev. 644 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 Mich. L. Rev. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 Stan. L. Rev. 449 (1975). And members of this Court have been no less vocal in their criticism.[1]

In *Weinberger v. Salfi*, 422 U.S. 749 (1975), this Court's dissatisfaction with the irrebuttable presumption, doctrine reached new heights when it termed such analysis "a virtual engine of destruction for countless legislative judgments." *Id.* at 772. At issue in that case

[1] Mr. Justice Rehnquist, in dissent, has characterized the doctrine as relying "heavily on notions of substantive due process that have been authoritatively repudiated," Vlandis v. Kline, 412 U.S. 441, 463, and as "in the last analysis nothing less than an attack upon the very notion of lawmaking itself." Cleveland Board of Education v. LaFleur, 414 U.S. 632, 660 (1974). The Chief Justice has criticized the doctrine since Stanley v. Illinois, 405 U.S. 645 (1972), and Mr. Justice Powell expressed concern "about the implications of the doctrine for the traditional legislative power to operate by classification." Cleveland Board of Education v. LaFleur, *supra*, at 652 (concurring opinion).

was a provision of the social security law denying benefits to a surviving wife who was married to a deceased wage-earner for less than nine months prior to his death. The law treated such relationships as shams, a presumption which was permanent and irrebuttable regardless of the evidence of legitimacy that a claimant could provide. In an attempt to distinguish *Vlandis,* the opinion of the Court said that unlike the Connecticut tuition scheme, "the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible." 422 U.S. at 772.

The dissenters were quick to note that there was little if any difference between the scheme at issue in *Vlandis* and *Salfi, id.* at 802-03, and lower courts have been troubled by the question of the effect to be given *Vlandis* after *Salfi.*[2]

The proffered distinction of *Vlandis*, which would have appeared to place a premium on the form of the classification at issue, was quickly laid to rest by this Court in *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976). There, this Court said that the mere fact that a statute was phrased in terms of an irrebuttable presumption would not invalidate a law "when its operation and effect are clearly permissible." *Id.* at 24. More importantly, in every case similar to *Vlandis, i.e.,* where a constitutionally protected interest was not at stake, this Court has rejected or deliberately refused to apply the irrebuttable presumption analysis. *See Knebel v. Hein,* 429 U.S. 288 (1977); *Murgia v. Massachusetts Board of Retirement,* 427 U.S. 307

[2] In Miller v. Carter, 547 F.2d 1314 (7th Cir. 1977), the Seventh Circuit took the unusual step of refusing to decide a due process question because "we cannot say whether the irrebuttable presumption doctrine or the substantive analysis followed in *Salfi* would be thought appropriate for this case by a majority of the Supreme Court." *Id.* at 1318-19.

(1976);[3] *Usery v. Turner Elkhorn Mining Co., supra; Skafte v. Rorex,* 553 P.2d 830 (Colo. 1976), *appeal dismissed for lack of a substantial federal question,* 97 S. Ct. 1638 (1977). And in *Fiallo v. Bell,* 97 S. Ct. 1473 (1977), this Court eschewed the irrebuttable presumption analysis even where a fundamental right was at stake.

From this wealth of authority, only one conclusion can be drawn: the legal basis of *Vlandis* already has been eroded substantially by this Court, and it now is time for it formally to be overruled.[4]

[3] *Murgia* is a critical case in the death of the *Vlandis* irrebuttable presumption doctrine. At issue was the constitutionality of a statute setting mandatory retirement for a police officer at fifty, a permanent and irrebuttable presumption if ever there was one. The lower court, in reliance upon Cleveland Board of Education v. LaFleur, found the statute violative of due process. On appeal this Court pointedly ignored the irrebuttable presumption holding below and upheld the statute, applying traditional equal protection analysis.

[4] This Court need only follow the mechanics it employed in Hudgens v. NLRB, 424 U.S. 507 (1976), where it explicitly recognized that Lloyd Corporation v. Tanner, 407 U.S. 551 (1972), had overruled Amalgamated Food Employees Union Local 570 v. Logan Valley Plaza, 391 U.S. 308 (1968).

CONCLUSION

Because of the deleterious effect of *Vlandis* on a host of state legislative judgments, including rationally based tuition policies of public colleges and universities, and in light of the importance of discarding the irrebuttable presumption doctrine, amici urge that the Court grant the instant petition of University of Maryland President Wilson H. Elkins for the issuance of a writ of certiorari, that the Court reverse the judgment below of the United States Court of Appeals for the Fourth Circuit, and that in so doing the Court overrule *Vlandis v. Kline, supra.*

Respectfully submitted,

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